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No. 81-2188

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

THE STATE OF MONTANA, *et al.*,
Petitioners

v.

NORTHERN CHEYENNE TRIBE OF THE NORTHERN CHEYENNE INDIAN RESERVATION, *et al.*,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF RESPONDENTS ASSINIBOINE AND SIOUX TRIBES, CONFEDERATED SALISH AND KOOTENAI TRIBES, AND NORTHERN CHEYENNE TRIBE

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QUESTIONS PRESENTED

1. May a federal district court dismiss suits to adjudicate water rights brought by Indian tribes under 28 U.S.C. 1362 in favor of state court adjudication of those same claims under a statute not even enacted when the federal suits were filed?

2. Does the McCarran Amendment, 43 U.S.C. 666, require dismissal of federal court suits to adjudicate Indian water rights in favor of state court adjudication of those rights where:

   a. The federal suits seek comprehensively to adjudicate all rights to the use of water on the stream systems involved?

   b. The federal suits were commenced before any state court proceedings had begun?

   c. The federal court is as convenient for adjudication as the state courts?

   d. The state court proceedings cannot in any event authoritatively determine the Indian rights?

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BRIEF OF RESPONDENTS ASSINIBOINE AND SIOUX TRIBES, CONFEDERATED SALISH AND KOOTENAI TRIBES, AND NORTHERN CHEYENNE TRIBE

ADDITIONAL STATUTE INVOLVED

The Act of October 10, 1966, 80 Stat. 880, 28 U.S.C. 1362 provides:

> The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.

STATEMENT OF THE CASE

No. 81-2188 comprises seven different cases, all filed in federal court to adjudicate water rights on river sys-

tems in Montana. These Montana cases are "general stream adjudications"—that is, they are suits to determine all rights to the use of water on the streams involved in the litigation.

1. Filing the federal court suits

In January 1975, respondent Northern Cheyenne Tribe filed an action in the District Court pursuant to 28 U.S.C. 1362 to adjudicate water rights in the Tongue River and Rosebud Creek and their tributaries in Montana. Two months later, the United States filed two suits in the District Court under 28 U.S.C. 1345. Both suits claimed that the United States was the owner of extensive water rights on its own behalf for national forests, reclamation projects, and other federal uses, and that it held additional rights in trust for the Indians. One complaint covered the Tongue River and Rosebud Creek and their tributaries, which arise on the Crow Reservation and then flow through the Northern Cheyenne Reservation. Jt. App. II, 15a-32a. The other concerned all other waters bordering, traversing, or underlying the Crow Reservation. Jt. App. II, 47a-69a. All known claimants to water rights within the affected drainages were named as defendants. The complaints prayed that "each and all of the defendants be required to . . . set forth fully their claims in and to the use of waters" in the streams involved, and that the court enjoin all "diversions and uses of the waters adjudicated . . . except in accordance with the rights and priorities as set forth in the court's decree." Jt. App. II, 30a, 32a, 67a-69a. Respondent Crow Tribe moved to intervene in both of the Government's suits, and respondent Northern Cheyenne Tribe in the first. Montana and other defendants filed motions to dismiss, which were renewed and argued in July 1976 just after this Court's decision in *Colorado River Water Conservation District* v. *United States*, 424 U.S. 800 (1976) (hereafter "*Colorado River*"). No action was taken on these motions until November 1979.

Meanwhile, in April 1979, the United States brought four suits in the federal district court to adjudicate water rights on the streams that border or traverse the Fort Peck, Blackfeet, Flathead, Rocky Boy's, and Fort Belknap Indian Reservations in Montana. As in the cases filed for the Crow and Northern Cheyenne Reservations, the United States claimed extensive water rights for competing, non-Indian federal uses [1] as well as for the Indian reservations. These complaints also named all known claimants, prayed that all defendants be required to set forth fully all their claims to the waters involved and asked that the decree set forth rights and priorities for all water uses in the streams involved. Jt. App. II, 108a-109a, 117a-118a, 131a-132a, 148a-149a. Pursuant to 28 U.S.C. 1362, the Assiniboine and Sioux Tribes of the Fort Peck Reservation immediately moved to intervene in the suits affecting their reservation, and respondent Confederated Salish and Kootenai Tribes of the Flathead Reservation were allowed by the Court of Appeals to intervene in the suit affecting their reservation.[2] As

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[1] For example, in the Milk River case the United States claimed rights to use water for Glacier National Park; for the Milk River Project of the Bureau of Reclamation; for grazing, stock watering, and water holes, and for various nonproducing oil and gas wells on public lands; for five national wildlife refuges and three waterfowl production areas; for two military installations; for customs stations; and to maintain and operate four reservoirs. In addition, in that same case the United States claimed rights on behalf of four different Indian tribes from the Milk River system. Jt. App. II, 101a-107a.

[2] For example, the complaints in intervention of the Assiniboine and Sioux Tribes of the Fort Peck Reservation were filed on April 10, 1979, five days after the suits were commenced, and served together with the complaint of the United States. The Tribes intervened in this manner, rather than filing a separate complaint, because they wished to avoid the substantial costs of serving process separately.

The intervenor tribes did *not* adopt the claims of the United States for other Indian tribes or for its non-Indian federal interests. *E.g.*, Jt. App. II, 150a-151a (Fort Peck). The tribes claim, and the Court of Appeals held, that these other claims create a conflict of

matters now stand, all tribes having an interest in the streams to be adjudicated in five of the Montana federal court cases are plaintiffs or have moved to intervene in those cases,[3] and one tribe having an interest in the streams to be adjudicated in a sixth case has intervened in that case.[4]

2. Subsequent state court proceedings

The Montana Legislature had enacted a Water Use Act in 1973. R.C.M. § 89-865 *et seq.* This Act was amended in 1975 and has since been repealed. Pet. App. F, 62-101. Proceedings were initiated under this Act only after the first suits were filed in federal court, and never progressed far.[5] In May 1979, one month after the four 1979 suits were filed, Montana enacted an entirely new Water Use Act, M.C.A. § 85-2-101 *et seq.* This Act required all claimants to water rights in Montana to file their claims by a date to be determined by the Montana Supreme Court on petition of the Attorney General. M.C.A. § 85-2-212.

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interest between the United States and the various tribes. See pp. 35-41, *infra*.

[3] These cases are *Northern Cheyenne Tribe* v. *Adsit*, CV-75-6-BLG (Northern Cheyenne Tribe plaintiff); *United States* v. *Tongue River Water Users Assoc.*, CV-75-20-BLG (Northern Cheyenne and Crow Tribes intervenors); *United States* v. *Big Horn Low Line Canal*, CV-75-34-BLG (Crow Tribe intervenor); *United States* v. *Aasheim*, CV-79-40-BLG (Fort Peck Tribes intervenor); *United States* v. *Abell*, CV-79-33-M (Flathead Tribes intervenor).

[4] The Fort Peck Tribes have intervened in *United States* v. *Aageson*, CV-79-21-GF, but the Blackfeet, Fort Belknap and Rocky Boy's Tribes have not. The seventh Montana case, *United States* v. *AMS Ranch*, CV-79-22-GF, involves rights of the Blackfeet Tribe only, and that Tribe has not intervened in it.

[5] In July 1975, Montana filed petitions in the state district courts for Rosebud and Yellowstone Counties requesting those courts to issue orders requiring claimants to water rights to file declarations of their claims. No such order was ever issued in Rosebud County. On August 26, 1975, an order "effective March 1, 1977" was issued by the Yellowstone County Court.

In May 1979, the Attorney General filed a petition under the new Act, and in June 1979, the state Supreme Court ordered that all claims to water rights arising before July 1973 be filed by January 1, 1982. Pet. App. H, 133-139. This time was subsequently extended to April 30, 1982. *Id.* at 140-142. The Montana Supreme Court rejected a request by the United States for further delay because of the pendency of these federal court suits, stating that "[t]he pendency of federal litigation does not affect the State of Montana in proceeding to adjudicate non-Indian claims." Pet. App. I, 144. In fact, no actual adjudications under the statute have been commenced or been scheduled.

3. Congressional oversight hearings

The federal cases became a major political issue in Montana. During July and August of 1979, the Senate Select Committee on Indian Affairs, chaired by Senator Melcher of Montana, held oversight hearings on the cases in Washington, D.C. and in three Montana cities. Senate Select Committee on Indian Affairs, 96th Cong., 1st Sess., Oversight Hearings on Litigation Involving Water Rights in Montana (1979). At these hearings, witness after witness urged their Senator to procure the immediate dismissal of the federal suits. *E.g.*, *id.* at 61, 107, 184-85, 196, 241. The Indians' own Congressman testified that the Indians should either surrender their protection under federal law or leave Montana. *Id.* at 281. Expressions of outrage at the tribes' asserting their rights in federal court were numerous. *E.g.*, *id.* at 206, 238-39, 502, 575-576. The federal water suits were characterized as "senseless harassment" of Montana's citizens. *Id.* at 183.

4. Federal district court proceedings

During 1979, and earlier in the Crow and Northern Cheyenne federal court cases, numerous defendants filed answers. Some defendants served interrogatories upon

the plaintiffs, *e.g.*, Jt. App. II, 3a, 5a. The United States served interrogatories and requests to produce documents, *Id.* at 6a, 7a, to which dozens of defendants responded. *Id.* at 6a-12a.[6]

In July 1979, the District Court, *sua sponte*, stayed the four suits that had been filed in April of that year. In November 1979, Judges Battin and Hatfield (to whom the seven cases had been severally assigned), acting without additional motions, briefing or argument, issued a joint Memorandum Opinion and Order dismissing all seven cases based on *Colorado River's* "policy of wise judicial administration." *Northern Cheyenne Tribe* v. *Tongue River Water Users' Association*, 484 F. Supp. 31 (D. Mont. 1979); Pet. App. E, 53-61.

5. Proceedings in the Ninth Circuit

The Ninth Circuit, one judge dissenting, reversed. *Northern Cheyenne Tribe* v. *Adsit*, 668 F.2d 1080 (9th Cir. 1982); Pet. App. C, D, 26-52. The Ninth Circuit held that the jurisdictional disclaimers in the Montana Constitution prevented Montana courts from adjudicating questions of water rights on Indian lands unless the disclaimer had been properly repealed. 668 F.2d at 1083-1087, Pet. App. C, 28-38. Alternatively, it held that under the test laid down in *Colorado River*, there were no exceptional circumstances warranting dismissal in the face of the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them," *Colorado River*, *supra*, at 817. 668 F.2d at 1087-1089, Pet App. C, 38-43.

The Ninth Circuit distinguished *Colorado River* on several grounds. It emphasized that the Montana cases were comprehensive, not piecemeal water rights adjudications. It observed that the state court litigation had not passed the notice stage and that the state legislation was not

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[6] There is no support in the record for Montana's repeated charges that the federal "cases were hastily filed." *E.g.*, Mont. Br., 5, 7, 8.

enacted until four years after the first federal suit was filed. It found that the federal court was equally convenient as the state water courts for an adjudication. Moreover, the Ninth Circuit concluded that, in light of the United States' conflicts of interests in representing tribes in state court, dismissal of these cases in favor of the state court proceedings would not be wise or appropriate. Finally, it held that the policy of 28 U.S.C. 1362—to permit Indian tribes to litigate their rights in federal court—would be frustrated if a state could obtain dismissal of a federal water rights suit in which a tribe itself was the plaintiff simply by subsequently suing the United States in state court.

SUMMARY OF ARGUMENT

These cases will determine whether the federal reserved water rights of all seven Montana Indian tribes—some of the largest tribes in the Nation—will be decided by life-tenured federal judges, as desired by the tribes, or by elected judges in Montana state courts.

The tribes' reserved water rights are essential to their lives, *Arizona* v. *California*, 373 U.S. 546, 599 (1963), and arise under federal law. Longstanding federal policy has been to determine federal Indian rights in the federal courts, protecting them from often hostile state court systems. This historic policy was reinforced by Congress in 1966, when it enacted 28 U.S.C. 1362, ensuring tribes a federal forum when they bring cases to protect their federal rights. Section 1362 controls here, where the tribes have brought or intervened in the actions as plaintiffs, and the Montana federal court cases should continue.

Neither the language or the purpose of the McCarran Amendment, 43 U.S.C. 666, alter this result. That Amendment's only purpose was to remove the sovereign immunity of the United States so as to allow it to be joined in water rights suits to provide a complete adjudication

of all rights on a given stream. *United States* v. *District Court for Eagle County*, 401 U.S. 520, 525 (1971); S. Rep. No. 755, 82d Cong., 1st Sess., 9. While the Amendment allows the United States to be sued for an adjudication of rights held in trust for Indian tribes, federal and state courts have *concurrent* jurisdiction to hear such suits. *Colorado River Water Conservation District* v. *United States*, 424 U.S. 800, 806-809 (1976). The legislative history of the McCarran Amendment confirms that it was intended neither to preclude nor discourage federal court adjudications, but merely to ensure that *some* court would have the capacity to adjudicate water rights held by the United States. Both the McCarran Amendment and Section 1362 can be given effect by adjudicating the rights of the Montana tribes in the federal cases to which they are parties.

In any event, these Montana cases should remain in federal court under the factors enumerated in *Colorado River*. The Montana cases are not piecemeal; they seek comprehensively to adjudicate all rights to the use of water in the stream systems they involve. The federal court in Montana was the first to assume jurisdiction over the subject matter. No ongoing state court proceeding existed when the federal suits were filed—indeed, the federal cases began before Montana even enacted its water adjudication statute. The federal court cannot be said to be a less convenient forum than state courts for the adjudication of the Montana cases. And the state court proceedings cannot adequately adjudicate the rights of the Montana tribes for two reasons. First, the State has disclaimed jurisdiction over Indian property. Second, conflicts of interest preclude the United States from adequately representing the tribes in the state court. Since the tribes themselves are not parties in state court and cannot be involuntarily joined, the state proceedings cannot authoritatively determine their rights. This defect does not exist in the federal court proceedings in which the tribes are parties.

Montana's contrary position would substitute, for the deliberative process of weighing factors established by *Colorado River*, a rule that would make state courts virtually the exclusive forum for adjudicating federal and Indian water rights. For if these cases are dismissed, no federal court adjudication could continue unless a state had no system for water rights adjudications, *and* established none even after federal litigation was brought by tribes. Except in such instances, rare and extremely unlikely to occur, state court jurisdiction over Indian water rights would become exclusive. Such a regime was considered but specifically rejected by Congress when it enacted the McCarran Amendment.

ARGUMENT

Introduction

For Montana's seven Indian tribes, the stakes in these cases are immense—perhaps determinative of the future existence of their reservations, societies and culture. For these are not cases to adjudicate one or two small or medium-sized stream systems, or to determine Indian water rights on streams within a state where non-Indian uses predominate. The issue here, simply put, is whether *all* the reserved water rights of *all seven* Indian tribes in Montana—a state with over five million acres of Indian trust lands,[7] where five of the nation's 20 largest Indian reservations are located[8]—will be decided in the federal or state courts. Prior to these and the Arizona cases, no State had ever sought to deny Indian tribes a federal forum to adjudicate Indian reserved rights of this magnitude and importance.

The critical nature of their reserved water rights for the future economic development of Montana's Indians is

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[7] Bureau of Indian Affairs, *Annual Report of Indian Lands* (1980) 2.

[8] Getches, Rosenfelt and Wilkinson, *Federal Indian Law: Cases and Materials* 4 (1979).

beyond question. As this Court recognized in *Winters* v. *United States*, 207 U.S. 564, 576 (1908), Montana Indian reservations are "arid and, without irrigation, . . . practically valueless"; only the waters reserved to the Indians can make the reservations "valuable or adequate."[9] When Congress created these Indian reservations, it recognized "that water from the river would be essential to the life of the Indian people" and that without water "their lands would have been useless." *Arizona* v. *California*, 373 U.S. 546, 599 (1963).[10]

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[9] *Winters* arose on the Fort Belknap Reservation, which is involved in one of these Montana cases.

[10] Indians' prior reserved rights were largely ignored in practice despite the Court's decision in *Winters*. During the fifty-year period subsequent to *Winters*

> the United States was pursuing a policy of encouraging the settlement of the West and the creation of family-sized farms on its arid lands. In retrospect, it can be seen that this policy was pursued with little or no regard for Indian water rights and the *Winters* doctrine. With the encouragement, or at least the cooperation, of the Secretary of the Interior—the very office entrusted with protection of all Indian rights—many large irrigation projects were constructed on streams that flowed through or bordered Indian Reservations, sometimes above and more often below the Reservations. With few exceptions the projects were planned and built by the Federal Government without any attempt to define, let alone protect, prior rights that Indian tribes might have had in the waters used for the projects . . . . In the history of the United States Government's treatment of Indian tribes, its failure to protect Indian water rights for use on the Reservations it set aside for them is one of the sorrier chapters.

National Water Commission, *Water Policies for the Future: Final Report to the President and to the Congress of the United States*, 474-75 (1973), hereafter cited as *National Water Commission Final Report*.

See also Hundley, "The Winters Decision and Indian Water Rights: A Mystery Reexamined," XII *Western Historical Quarterly* 17 (1982); Hundley, "The Dark and Bloody Ground of Indian Water Rights: Confusion Elevated to Principle," IX *Western Historical Quarterly* 455 (1978).

The Indians' reserved rights arise under federal law, which in important respects conflicts with and overrides established doctrines of state water law.[11] *Winters* itself illustrates this conflict and the dominance of federal law principles. In *Winters*, the United States sued to restrain diversions by non-Indians from the Milk River upstream from the Fort Belknap Reservation in Montana, because insufficient water was reaching the Reservation to meet Indian needs for developing agricultural lands and related uses. Although the non-Indian diversions had commenced first, and thus would have prevailed under state law, this Court affirmed an injunction against those irrigators, since their diversions began after the Reservation was established and could interfere with its future development.[12]

The narrow issue in the present cases concerns choice of forum: will the reserved water rights of Montana's

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[11] Water rights under state law in most western states are created by "prior appropriation"—diversion of water from a stream and its application to a beneficial use. In times of shortage, holders of rights that were initiated first have priority over subsequent appropriators. This means that in years of short supply, a water user who has been appropriating water the longest is entitled to his *full* diversion requirement before a junior user gets any water. However, under state law, water rights are lost if they are not continuously exercised.

In contrast, Indian reserved water rights based on federal law are not predicated on actual diversions of water or its prior beneficial use. The Indians' right arises no later than the date of the reservation and is measured by the amount of water necessary in the future to fulfill the purposes of the reservation, not what has actually been used in the past. *See Felix S. Cohen's Handbook of Federal Indian Law*, ch. 10 (1982 ed.).

[12] *See National Water Commission Final Report, supra* n. 10, at 473. "Thus an Indian Reservation established in 1865 which commences its first use of water in 1965 has, in times of shortage, a right to receive water ahead of any non-Indian water right with a priority date after 1865." Since "[m]ost Indian Reservations were established before substantial water development was made by non Indians," Indian priorities are usually superior. *Id.* at 476.

seven Indian tribes be determined by the state or federal courts? Contrary to the petitioners' charges (Ariz. Br., 33; Mont. Br., 32-33), the Tribes do not invoke federal court jurisdiction for the purpose of disrupting state judicial and administrative machinery. The Tribes' choice of a federal forum is grounded on the traditional inhospitality of state courts to Indian rights and the Tribes' trust that federal judges—with constitutionally guaranteed life tenure, fixed and irreducible compensation and greater familiarity with federal Indian law—are better able than state courts to adjudicate Indian claims to precious and scarce water resources. Similarly, the petitioners desire a state forum because of their conviction that elected state judges will incline toward the interests of the more numerous and politically powerful holders of state water rights at the expense of the poor and vulnerable Indians.[13]

I. Long History, Good Reasons, and 28 U.S.C. 1362 Support the Montana Tribes' Choice of a Federal Forum For These Cases.

Since Indian reserved water rights arise under federal law, are "essential to the life of the Indian people," *Arizona* v. *California*, 373 U.S. 546, 599 (1963), and conflict with doctrines of state water law, federal courts are the preferred forum for such cases. In Sections II and III, we show that the McCarran Amendment, 43 U.S.C. 666, does not require (or, in the circumstances of these cases, allow) a contrary result. In this Section, we briefly

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[13] Although it recommended that most federal water rights be tried in state courts, the National Water Commission concluded that Indian water rights should not:

> Because of potential conflict between Indian and non-Indian water users and to avoid the suspicion of bias that might attend adjudication by elected State officials, the Commission recommends that Indian water rights be adjudicated in Federal Court, the traditional forum for this kind of litigation.

National Water Commission Final Report, *supra* note 10, at 479.

review the long history of federal court protection of Indians' federal rights. That history, culminating with the enactment of 28 U.S.C. 1362, requires a federal forum for these cases where Indian tribes are parties.[14]

This Court long ago recognized that Indian tribes "owe no allegiance to the State, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies." *United States* v. *Kagama*, 118 U.S. 373, 384 (1886). Recent decisions of the Court illustrate vividly the continued vitality of these precepts. *See, e.g., Ramah Navajo School Board* v. *New Mexico Bureau of Revenue*, —— U.S. ——, No. 80-2162, slip. op. at 14 (July 2, 1982) ("[state] courts below apparently gave short shrift to . . . [this Court's] precedents in this area . . ."); *Washington* v. *Washington State Commercial Fishing Vessel Ass'n*, 443 U.S. 658, 696 n.36 (1979) (quoting Court of Appeals' observation that " 'Except for some desegregation cases . . . the [federal] district court has faced the most concerted official and private efforts to frustrate a decree of a federal court witnessed in this century' "); *Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661, 678 (1974) ("There has been recurring tension between federal and state law; state authorities have not easily accepted the notion that federal law and federal courts must be deemed the controlling considerations in dealing with the Indians"). *See also Rice* v. *Olson*, 324 U.S. 786, 789 (1945) ("The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history").

Congress, also recognizing the frequent hostility of state institutions to Indian rights, has often provided specifically for enforcement of federal Indian law in federal

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[14] In *Colorado River*, this Court specifically left open the question whether the factors considered in that case would ever permit dismissal of a water suit brought by a private party, such as an Indian tribe. 424 U.S. at 820 n. 26.

court.[15] The most important of these statutes for present purposes is 28 U.S.C. 1362, which authorizes Indian tribes to bring federal question suits in federal courts without regard to the amount in controversy. Enacted in 1966, Section 1362 evinces the congressional policy that controls this case: federal courts are the preferred forum for deciding suits brought by Indian tribes to protect their property rights arising under federal law.[16]

The House Report on the bill that became Section 1362 recognized that "the issues involved in cases involving tribal lands . . . are Federal issues," and "particularly as to this class of cases it is appropriate that the actions be brought in the U.S. district court," H.R. Rep. No. 2040,

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[15] In 1953, during the height of a brief period when it was considering terminating the special federal relationship with Indian tribes, Congress enacted Pub. L. No. 83-280, 67 Stat. 588, now partially codified as 18 U.S.C. 1162, 28 U.S.C. 1360 and, as amended in 1968, 25 U.S.C. 1321, 1322, and 1324. Public Law 83-280 extended state court jurisdiction over Indians in several states with respect to criminal offenses and many civil causes of action. At the same time, Public Law 83-280 also demonstrated Congress' commitment to having Indian property disputes resolved in the federal courts, for Congress specifically withheld from state courts jurisdiction to adjudicate the ownership or right to possession of "real or personal property *including water rights*, belonging to any Indian or Indian tribe" or any interest in them. 28 U.S.C. 1360(b), 25 U.S.C. 1322(b) (emphasis added).

25 U.S.C. 357, enacted in 1901, provides that Indian allotted land "may be condemned for any public purpose under the laws of the State . . . where located in the same manner as land owned in fee may be condemned." On its face the statute is silent as to whether the condemnation proceedings are to take place in state or federal courts. Despite the fact that Section 357 makes state substantive law applicable to some Indian lands, *Minnesota* v. *United States*, 305 U.S. 382 (1939), held that it did not confer jurisdiction on state courts.

[16] Section 1362 provides an independent basis for federal jurisdiction both for suits brought by tribes as plaintiffs and for suits in which they intervene. *See Fuller* v. *Volk*, 351 F.2d 323, 328-329 (3d Cir. 1965).

89th Cong., 2d Sess. 2 (1966). The Senate Report echos: "[f]ederal courts have more expertise in deciding questions involving treaties with the Federal Government, as well as interpreting the relevant body of Federal law that has developed over the years." S. Rep.. No. 1507, 89th Cong., 2d Sess., 2 (1966). The Interior Department report, supporting the bill, is contained in both the House and Senate Report. It specifically states that "the issues involved are Federal issues *and the tribes should not be required to conduct the litigation in the State courts.*" *Id.* at 3; H. Rep. No. 2040, 89th Cong., 2d Sess. 3 (1966) (emphasis added).[17]

Congress recognized too that Indian tribes, often with good reason, have long feared the exercise of state authority over them. The Senate Report observed that "[t]here is great hesitancy on the part of the tribes to use State courts. This reluctance is founded partially on the traditional fear that tribes have had of the State in which their reservations are situated." *Id.* at 2.[18]

These Montana Indian water rights cases give rise to the very concerns that troubled Congress when it enacted Section 1362. Federal law issues stand at the heart of the cases, and conflict directly with established principles

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[17] Congress also enacted Section 1362 because it was concerned about "cases wherein the interest of the Federal Government as guardian of the Indian tribes and as Federal sovereign conflict." S. Rep. No. 1507, 89th Cong., 2d Sess. 2 (1966). These are precisely such cases. See pp. 35-41, *infra*.

[18] The propensity of elected state court judges to favor the interests of states and their non-Indian constituents is a current, not just historic, problem. In three recent Indian property rights cases in which the federal courts had previously acquired jurisdiction, state courts issued injunctions impinging on that federal jurisdiction—even though neither the United States nor the affected Indian tribes were parties to the state actions. The federal courts then enjoined all three state court suits. *Cayuga Indian Nation of New York* v. *Fox*, 544 F. Supp. 542 (N.D. N.Y. 1982); *United States* v. *Michigan*, 508 F. Supp. 480 (W.D. Mich. 1980); *United States* v. *Washington*, 459 F. Supp. 1020, 1028-1034 (W.D. Wash. 1978).

of state water law. There are intense local feelings against the Indian claims. *E.g.*, Senate Select Committee on Indian Affairs, 96th Cong., 1st Sess., Oversight Hearings on Litigation Involving Water Rights in Montana 114-115, 121, 139, 205-206, 214-215, 241-242, 442-447, 575-576 (1979). See p. 5, *supra*. State court proceedings simply do not protect Indian rights against this local hostility as well as federal courts. Montana's elected state judges—who in all likelihood must stand for reelection during the course of these adjudications [19]—may "be too little independent to be relied upon for an inflexible execution of the national laws." *The Federalist* No. 81 (Hamilton) 547 (J. Cooke ed. 1962).[20]

II. The McCarran Amendment Does Not Bar Federal Court Adjudication of These Cases.

Montana argues that the McCarran Amendment upsets two centuries of national Indian policy, overrides the

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[19] Montana water judges serve for a fixed term, approximately six years for the initial term, and four years thereafter. M.C.A., § 3-7-202. It is now almost four years since the state legislation was enacted, so it is safe to conclude that these water rights actions would take more than six years from the date of the legislation to adjudicate.

[20] The Tribes agree with the United States that 28 U.S.C. 1345 should also be construed to permit a federal forum for actions brought by the United States to adjudicate Indian rights.

In the event the Court holds otherwise, we nonetheless urge that Section 1362 should be so read. Section 1345, originally enacted in 1911, Act of March 3, 1911, c. 231, § 24, 36 Stat. 1091, predates the McCarran Amendment. The McCarran Amendment, moreover, covers the same subject as Section 1345—suits in which the United States is a party. By contrast, the Amendment does not mention suits in which tribes are parties, and had not been construed to cover Indian water rights at all in 1966, when Section 1362 was enacted. Passed after the McCarran Amendment, Section 1362 should control as to suits where tribes are plaintiffs. In addition, the legislative history of Section 1362 expresses a special solicitude for federal court protection of Indian rights which should be given effect.

specific mandate of Section 1362 and requires Indian water rights to be adjudicated in state court—even where the federal court cases in which the tribes are plaintiffs are filed prior to enactment of the state adjudicatory scheme. But, as we discuss more fully below, nothing in the language or history of the McCarran Amendment supports that contention.[21] The Amendment has been construed by this Court as doing nothing more than authorizing the exercise of jurisdiction by state courts, *concurrent with federal courts*, to adjudicate Indian reserved water rights. *Colorado River*, 424 U.S. at 809. It was "not intended . . . to be used for any other purpose than to allow the United States to be joined in a suit wherein it is necessary to adjudicate all of the rights of various owners on a given stream." S. Rep. No. 775, 82d Cong., 1st Sess. 9, *quoted in United States* v. *District Court for Eagle County*, 401 U.S. 520, 525 (1971) and *Colorado River*, 424 U.S. at 808. That purpose, we will show, can be and has been effectuated by suits in both federal and state courts. Accordingly, nothing in the language or purpose of the McCarran Amendment conflicts with Section 1362's guarantee of a federal forum where Indian tribes are plaintiffs.[22] Both Section 1362 and the McCarran Amendment can and should be given harmonious

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[21] The McCarran Amendment provides, in relevant part, that

> Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source . . . where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit . . . .

[22] To the extent there is any conflict between the McCarran Amendment and Section 1362, the latter controls. It is the later enactment and is more specific, because it applies only to suits brought by tribes to adjudicate their property rights. By contrast, the McCarran Amendment encompasses all suits involving water rights owned or claimed by the United States. *See Morton* v. *Mancari*, 417 U.S. 535, 550-51 (1974).

effect by allowing federal courts to proceed with an adjudication of water rights where their jurisdiction has been timely invoked by an Indian tribe.[23]

A. The legislative history of the Amendment shows that both federal and state court adjudications were contemplated.

The legislative history of the McCarran Amendment confirms this Court's holdings in *Eagle County* and *Colorado River* that its only purpose was to lift the immunity of the United States from suit so that federal and Indian rights to the use of water could be included in general stream adjudications, whether in state or federal courts. *Colorado River*, 424 U.S. at 807-808; *Eagle County*, 401 U.S. at 525. As Senator McCarran stated in a letter to Senator Magnuson, the bill which became 43 U.S.C. 666 was

> *not intended to be used for any other purpose than to allow the United States to be joined in* a suit wherein it is necessary to adjudicate all of the rights of various owners on a given stream. This is so because unless all of the parties owning or in the process of acquiring water rights on a particular stream can be joined as parties defendant, any subsequent decree would be of little value.

S. Rep. No. 755, 82d Cong., 1st Sess. 9 (emphasis added).

The history of the McCarran Amendment reflects this limited purpose. The statute enacted was a compromise between two polar extremes: the position of some states and private water interests that state courts should have exclusive jurisdiction over suits involving water rights

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[23] If no suit is pending in federal court in which a tribe is plaintiff or intervenes, a state may sue the United States as a defendant under the McCarran Amendment, and normally this suit may include Indian rights for which the United States is a trustee. On the other hand, once a Tribe has invoked the policy of Section 1362 by timely bringing or intervening in a federal court action, the federal case should be adjudicated.

of the United States, and the position of federal agencies that the sovereign immunity of the United States should not be waived to permit suit in *any* court.[24] Congress rejected both positions. It waived the government's im-

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[24] In the Senate hearings on S. 18, which became the McCarran Amendment (Hearing Before a Subcommittee of the Committee on the Judiciary, United States Senate on S. 18, A Bill to Authorize Suits Against the United States to Adjudicate and Administer Water Rights, 82d Cong., 2d Sess. (1951)) (hereinafter "Senate Hearings"), federal agencies testified to express opposition to any legislative waiver of the United States' immunity from suit, whether in state or federal court. (Testimony of Mr. William Veeder of the Justice Department, Senate Hearings, 20, 57-66.)

The printed Hearings also contained letters from the Justice and Interior Departments setting forth their views on S. 18. The Justice Department opposed the general waiver of sovereign immunity as portending "piecemeal adjudication of water rights," and a "multiplicity of actions." *Id.* at 66-67. The Interior Department proposed a substitute, authorizing suit against the United States only where the United States claimed rights under state law and not where claims to water were asserted on behalf of Indians. *Id.* at 67-68.

Representatives of the National Reclamation Association (NRA) —an organization representing water users in several western states —also testified in opposition to S. 18, but for a completely different reason: the National Reclamation Association endorsed *exclusive* state court jurisdiction over all western water rights suits (*Id.* at 21, 22, 29, 49, 53-54). The Association argued for a bill waiving federal immunity from suit so the United States:

> may either sue or be sued in the State courts in adjudication matters, in matters having to do with changes of points of diversion, and in matters having to do with abandonment of water rights, so that as an appropriator of rights the United States will stand on the same footing as any other appropriator. *Id.* at 29.

Attorney General W. T. Mathews of Nevada, in a written statement, also endorsed state jurisdiction over federal water rights. *Id.* at 44-49. However, he supported S. 18 as "a step in the right direction" in that it would "remove the immunity of the United States and its departments from suits and proceedings involving the most important matter of water rights." *Id.* at 49.

munity from suit, but without regard to whether the suit brought to quantify all water rights on a stream was in federal or state court.

The language of 43 U.S.C. 666 authorizes joinder of the United States as a defendant in "any" suit for the adjudication of water rights owned by the United States. This language, of course, would cover suits in federal or state courts. Other bills were pending before Congress that would have "had the effect of precluding suits by the United States in district court for the determination of water rights . . . ." *Colorado River*, 424 U.S. at 807-808. *See* H.R. 7691, 82d Cong., 2d Sess. (1952); H.R. 5737, 82d Cong., 2d Sess. (1951). But these bills were not enacted by Congress.

Likewise, the Senate Committee emphasized that without a waiver of immunity, federal claims to water make any stream adjudication ineffective, whether in federal or state court:

> Unless Congress has removed such immunity by statutory enactment, the bar of immunity from suit still remains and any judgment or decree of the State court is ineffective as to the water right held by the United States. *Congress has not removed the bar of immunity even in its own courts* in suits wherein water rights acquired under State law are drawn in question. *The bill (S. 18) was introduced for the very purpose of correcting this situation and the evils growing out of such immunity.*

S. Rep. No. 755, 82d Cong., 1st Sess., 5 (1952) (emphasis added).

Some witnesses in the Senate hearings on S. 18 did advocate the desirability of state court adjudications of federal water rights. Their statements focused on circumstances where the United States acts as an appropriator of water *under state law*, as in reclamation projects. *E.g.*, Senate Hearings, *supra*, at 49 (Statement

of W. T. Mathews, Nevada Attorney General).[25] This sentiment was also expressed by Senator Watkins of Utah, a member of the Senate Committee— who stated that where the United States files for state water rights in a reclamation project, and is required by Section 8 of the Reclamation Act to follow state water law in other respects—"why shouldn't the United States in those circumstances in that type of case be perfectly willing to go into the state court just as it has gone in before the state engineer, and permit an adjudication?" *Id.* at 11.

These statements hardly imply that Congress intended to preclude federal court general stream adjudications, at least where Indian reserved rights are involved. To the contrary, some senators explicitly stated that a particular federal court water case should continue. When a Senate Appropriations Subcommittee held hearings on the measure that ultimately became the McCarran Amendment, Senators Millikin and Johnson of Colorado opposed an amendment to the Justice Department appropriations bill passed by the House because it would have jeopardized a water rights adjudication brought by the United States in federal district court in Denver. Hearings Before the Subcommittee of the Committee on Appropriations, United States Senate, on H.R. 7289, 82d Cong., 2d Sess. 1346-47 (1952).[26] Senator Millikin stated that he did not wish to "impede the progress" of that federal court litigation. *Id.* at 1347. Meeting Senator Millikin's objection, the

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[25] Testimony of witnesses and comments of Senators did not refer to federal or Indian reserved water rights.

[26] These hearings came about because, after S. 18 had passed the Senate, the House amended an appropriations bill to prohibit the use of funds for any suit by the United States (1) against a state or (2) against more than 2,500 defendants. This amendment was specifically aimed at stopping pending litigation brought in federal court in California by the United States to adjudicate its water rights for a military base—Camp Pendleton—in the Santa Margarita River watershed. 98 Cong. Rec. 3555-56 (1952).

Senate Appropriations Committee reported the appropriations bill, substituting, without comment, the language of S. 18 for the House-passed amendment. S. Rep. No. 1807, 82d Cong., 2d Sess., 10 (1952). The bill passed the Senate,[27] went to conference, and was enacted.

In sum, not only the language but also the history of the McCarran Amendment suggests no preference for state over federal courts in suits to adjudicate water rights, and there is certainly nothing to imply that state courts would become the exclusive forums for adjudicating Indian rights. The Amendment evinces no intention to preclude federal court litigation. The only fair reading of the Amendment—the reading given it in both *Eagle County* and *Colorado River*—is that it waived the immunity of the United States from suit in either federal or state court cases to adjudicate generally all water rights on a stream system.[28]

B. Federal courts have routinely adjudicated water rights suits since the McCarran Amendment was enacted.

Montana and various *amici* suggest that the practice under the McCarran Amendment has been to favor general stream adjudications in state courts, and to disfavor such cases proceeding in federal courts. *E.g.*, Montana Br., 26, 39; Wyoming *Amicus* Br., 24-25. Montana even states that general stream adjudications in federal court are "impossible" (Br., 34). The actual practice shows this is not so.

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[27] On the Senate floor, the California senators successfully added a provision specifically barring the use of funds for the Santa Margarita litigation. 98 Cong. Rec. 8110 (1952).

[28] Some briefs for the States imply that a suit naming the United States as a defendant in *federal* court might fail because of the "well-pleaded complaint rule." *E.g.*, Wyoming Amicus Brief, 24-25. But this is clearly not so where the United States is sued with re-

In three decades since the McCarran Amendment, general stream adjudications involving, *inter alia*, rights held by the United States for Indian tribes have proceeded smoothly in federal as well as state courts. Federal district courts have in the past five years [29] handled several general stream adjudications to determine all rights to the use of water of Indian tribes and persons claiming under state law in four far western states.[30] These cases

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spect to rights reserved to Indian tribes (or other federal reservations) under federal law.

The reserved rights to be adjudicated in these Montana cases—whether the United States sues as a plaintiff or is sued as a defendant—clearly arise under federal law. *Colorado River, supra; Cappaert* v. *United States*, 426 U.S. 128, 145 (1976); *Arizona* v. *California*, 373 U.S. 546, 599-601 (1963). As such, a case seeking to adjudicate the Indian reserved rights is within the original jurisdiction of a federal court. The leading case so holding is *Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661 (1974), where this Court reversed a lower court decision that an action to determine rights "conferred by federal law, wholly independent of state law," should be dismissed for want of federal question jurisdiction under the well-pleaded complaint rule. *Id.* at 666. *Accord, South Dakota ex rel Meierhenry* v. *Rippling Water Ranch, Inc.*, 531 F. Supp. 449, 454-455 (D.S.D. 1982).

[29] Federal court general stream adjudications in cases involving Indian water rights has also been the historic practice, both before and after the McCarran Amendment. *E.g., United States* v. *Ahtanum Irrigation District*, 330 F.2d 897 (9th Cir. 1964) (after McCarran Amendment); *United States* v. *Walker River Irrigation District*, 104 F.2d 334 (9th Cir. 1939) (before McCarran Amendment).

[30] At the present time "there are ten water rights adjudication suits pending in New Mexico, four suits in state court and six suits in federal court" (New Mexico's *Amicus* Br., 2). The federal court suits involve various general stream adjudications to tributaries of the Rio Grande, on which Indian pueblos claim water rights. *E.g., New Mexico* v. *Aamodt*, 537 F.2d 1102 (10th Cir. 1976), *cert. denied*, 429 U.S. 1121 (1977). Following trial, a decision was issued by the special master in one of these cases in September 1982.

Two general stream adjudications have recently taken place in Washington. *United States* v. *Anderson*, No. 3643 (E.D. Wash.,

show that general stream adjudications can—and do—proceed in either state or federal courts. Sometimes, as in New Mexico and Washington, federal courts adjudicate all water rights on certain streams, while state courts do so on others. Both forums are available and the purpose of the McCarran Amendment—to have all rights on a stream determined—is effectuated by an adjudication in either forum.

In the present case, the policy of Section 1362 ensures tribes a federal forum when they sue as plaintiffs to protect property rights arising under federal law. This statute, consistent with the purpose of the McCarran Amendment, controls and the federal court is the only appropriate forum for the Montana cases.[31] However, if any question remains as to which forum should adjudicate these controversies, *Colorado River* supplies the fac-

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July 23, 1979), *appeal pending*, Nos. 82-3597, and -3625 (9th Cir.) is a federal court general stream adjudication which determined the rights of the Spokane Tribe and all persons claiming under state law in the Chamokane Creek, a tributary to the Spokane River in Washington. *United States* v. *Walton*, 647 F.2d 42 (9th Cir.), *cert. denied*, 454 U.S. 1092 (1981) is a general adjudication of Indian and non-Indian rights on a creek on the Colville Indian Reservation in Washington.

See also United States v. *Adair*, 478 F. Supp. 336 (D. Or. 1979), *appeal pending*, Nos. 80-3229, -3245, -3246 and -3257 (9th Cir.) (general stream adjudication of the Williamson River, a tributary of the Klamath River in Oregon); *United States* v. *Truckee-Carson Irrigation District*, 649 F.2d 1286, *modified*, 666 F.2d 351 (9th Cir.), *cert. granted*, Nos. 81-2245, -2276 and 82-33, 51 U.S.L.W. 3287 (1982); *United States* v. *Orr Water Ditch Co.*, Equity No. A-3 (D. Nev.) (general stream adjudications along the Truckee River in Nevada to determine the water rights of the Pyramid Lake Paiute Tribe and thousands of water users claiming under state law).

[31] Arizona argues that state court jurisdiction over these cases is somehow supported by the rule of *Williams* v. *Lee*, 358 U.S. 217, 220 (1958):

tors to resolve it. As we show in Section III, application of the *Colorado River* factors also leads to the conclusion that the federal court is a preferable forum for the Montana cases.

III. The *Colorado River* Factors Favor Federal Court Determination of the Montana Cases.

A. Piecemeal adjudication is avoided.

1. *The Montana federal cases are comprehensive, not piecemeal.*

The factors, applied by the Court in *Colorado River* to determine which concurrent forum should proceed to adjudicate water rights all favor retention of the Montana cases in federal court. The Court in *Colorado River* considered that the "most important" factor was the "clear federal policy evinced by" the McCarran Amend-

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absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.

Arizona Br., 29-30.

The short answer to this argument is that the intersecting policies of "governing Acts of Congress"—the McCarran Amendment and Section 1362—control which forum has jurisdiction in this case. *Colorado River* so holds.

The only basis for state court jurisdiction to adjudicate Indian reserved water rights is the McCarran Amendment. The "tribal infringement" test has never been used to justify state court jurisdiction over reservation Indians and trust or restricted Indian property in the absence of a statute conferring jurisdiction on state courts. *E.g., White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 144 (1980); *Bryan* v. *Itasca County*, 426 U.S. 373, 376 n.2 (1976); *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164, 179-180 (1973); *Williams* v. *Lee*, *supra*, at 221 ("Significantly, when Congress has wished the States to exercise [civil and criminal jurisdiction over Indians] it has expressly granted them the jurisdiction . . . .").

ment to avoid piecemeal adjudication. 424 U.S. at 819.[32] As the Court of Appeals concluded, there is nothing piecemeal about these Montana federal court cases. *Northern Cheyenne Tribe* v. *Adsit*, *supra*, Pet. App. C, D, 26-52. Each is a general stream adjudication. All water rights claimants on the stream are made parties, and the suits seek to establish the rights of all claimants *inter sese*, whether those rights arise under federal or state law. *Compare Dugan* v. *Rank*, 372 U.S. 609, 618-619 (1963). All rights are proposed to be comprehensively determined in federal court. No fragment or piece of the cases remains to be decided elsewhere.[33]

2. *Montana's contentions concerning "piecemeal adjudication" are without merit.*

Montana contends that "[t]he federal suits are geographically piecemeal" because they seek to adjudicate all

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[32] Some other parties assert that *Colorado River* was also a general stream adjudication, *e.g.*, Arizona Br., 36, but it was clearly not so viewed by this Court, which observed that the United States only "sought declaration of *the Government's rights* to waters in certain rivers and their tributaries. . . ." 424 U.S. at 805 (emphasis added). The dissent agreed. 424 U.S. at 822-823. And in its brief to the Court in *Colorado River*, the United States stated that "[t]his suit, which seeks only to establish the rights of the United States, is not a general adjudication within the meaning of *Dugan* v. *Rank*." U.S. Brief, 21 n.14.

[33] In this Court, the United States suggests that *Colorado River* should be clarified to permit federal court adjudication of Indian rights and incorporation of those determinations into the concurrent state court proceedings to adjudicate rights arising under state law. These cases were brought as general stream adjudications because the tribes (and presumably the United States) read *Colorado River* as requiring a unified, comprehensive adjudication of all rights on a stream in a single forum. If the Court should adopt the Government's position, this would achieve the tribes' central purpose in filing these cases: to secure a federal forum for the adjudication of their water rights. The tribes would in that event ask leave to amend their complaints so as to preserve federal court jurisdiction over their rights.

rights to the use of water on certain tributaries to the Missouri River while omitting "the main stem of the . . . River." (Montana Br., 33.) This Court has held, however, that adjudication of a main stem river is not required in order to have a complete and final adjudication of all rights on a tributary. In *Eagle County*, a unanimous Court dismissed as "almost frivolous" the argument that a tributary is not a river system and a general stream adjudication could not be had upon it without encompassing the main stem. 401 U.S. at 523. The principle is very well established that parties may adjudicate all rights to use water on a tributary without joining as an indispensable party every water user on the ultimate main stem. See, *e.g.*, *Winters* v. *United States*, 207 U.S. 564 (1908) (involving the Milk River only).[34]

The reason for this rule is readily apparent. Waters are far more likely to be in short supply on a tributary than on a large main stem river. For example, the Missouri River contains an average annual flow of over seven million acre feet (over 2,275,000,000,000 gallons) per year in eastern Montana, less than one-sixth of which is consumed in the State.[35] By contrast, many tributary streams flowing into the Missouri are dry during some of the irrigation season and other months. Thus, while an adjudication of water rights on the main stem Missouri might be unnecessary because of the abundance of

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[34] *Accord*, *New Mexico* v. *Aamodt*, 537 F.2d 1102 (10th Cir. 1976), *cert. denied*, 429 U.S. 1121 (1977) (involving tributaries to the Rio Grande in New Mexico, not the main stem); *United States* v. *Anderson*, No. 3643 (E.D. Wash., July 23, 1979), *appeal pending*, Nos. 82-3597 and -3625 (9th Cir.) (involving Chamokane Creek, a tributary to the Spokane River in the Columbia River system in Washington); *Hurley* v. *Abbott*, 259 F. Supp. 669 (D. Ariz. 1966) (concerning a motion to enlarge an earlier adjudication involving some streams on the Salt and Verde River system in Arizona).

[35] Department of the Interior, Bureau of Reclamation, Draft Environmental Statement (Int. DES 76-38), *Water for Energy, Missouri River Basin*, tables 2-2, 2-3 (1976).

water relative to demand, such an adjudication and apportionment of waters on tributary streams could be essential. A rule requiring joinder of all users on a main stem in order to determine rights on a tributary would force needless and costly litigation.[36]

B. The federal court was the first to acquire jurisdiction over the subject matter of the Montana cases.

In *Colorado River*, the Court also discussed the principle "requiring that jurisdiction be yielded to the court first acquiring control over the property," noting that this jurisdiction should generally be exclusive so as to avoid "additional litigation" and "inconsistent dispositions of property." 424 U.S. at 819. The Court held, consequently, that in deciding whether to dismiss or retain a case the district court should "consider the order in which jurisdiction was obtained by the concurrent forums." *Id.* at 818.

There can be no question that in all these cases the federal court was the first to acquire control over the rivers. See pp. 2-5 *supra*. Montana argues that the same was true in *Colorado River* (Br., 37), but, again, it is wrong. As this Court explained: "the [Colorado] Act established a single continuous proceeding for water rights adjudication which antedated the suit in District Court." 424 U.S. at 819. The Colorado Water Rights Determination Act, Col. Rev. Stat. Ann. 37-92-101 *et seq.*, had been enacted in 1969, *id.* at 804, setting up a continuing system for the determination of newly filed water rights.

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[36] Only one of the seven Montana Indian Reservations, Fort Peck, is located on the Missouri River. It would be ridiculous if there could be no adjudication of water rights for, say, the Northern Cheyenne or Crow Reservations, located on tributaries to the Yellowstone River hundreds of miles upstream from where it joins the Missouri *in North Dakota*—or for the Blackfeet Reservation located on the headwaters of tributaries to the Missouri hundreds of miles upstream of their junction with the Missouri in eastern Montana—without also joining all users on the main stem.

By 1972, when the federal suit was filed, both aspects of the Colorado system—the adjudication of newly filed applications and the compilation of all decreed rights for each stream—were well underway. The United States, moreover, was actively participating in water rights adjudications in three divisions of the Colorado state court. *Id.* at 806.

Moreover, substantial proceedings beyond the filing of the complaint had taken place in all seven Montana federal cases before they were dismissed by the District Court. Three cases, involving the Crow and Northern Cheyenne Tribes, had been in litigation for over four years prior to dismissal. In all seven cases, scores of parties had filed answers on the merits. The plaintiffs had commenced discovery by filing interrogatories, and these had been answered by numerous defendants. Jt. App. II, 6a-12a. This contrasts sharply with the "significant" lack of such proceedings in *Colorado River*, 424 U.S. at 820.

C. The federal forum is at least as convenient as the state courts in the Montana cases.

1. *Location of the federal court is as convenient as the state water courts.*

The federal cases were filed in Great Falls, Missoula and Billings. There are four additional sites where the United States District Court for the District of Montana is authorized to sit—Butte, Havre, Glasgow and Helena. Montana law establishes only four water divisions for the entire state. M.C.A. 85-2-13. As the Court of Appeals correctly concluded, there is no basis for the District Court's unsupported conclusion that the state forum will likely be more convenient, geographically, than the federal forum. Pet. App. C, 42-43.

2. *There are no procedural advantages to the state court.*

a. *Service of process rules.*

Montana argues that the special service of process rules contained in its state legislation—providing notice of the suit through publication and other means—are an advantage for the state court proceedings as contrasted to the federal court actions (Mont. Br., 31-35). The argument implies that the federal courts are hamstrung by requirements that every claimant be served, while state statutes can provide exemptions from that rule which streamline the adjudication. This argument is incorrect.

First, federal courts have often served all parties to major general stream adjudications and proceeded to adjudicate water rights.[37] For example, *United States* v. *Truckee-Carson Irrigation District*, 649 F.2d 1286, *modified*, 666 F.2d 351 (9th Cir.), *cert. granted*, 51 U.S.L.W. 3287 (1982), involved federal and Indian water rights as well as some 17,000 private parties claiming water under state law. Service of process rules certainly did not hamstring federal courts in that suit, or other federal actions (see pp. 22-25 *supra*) from adjudicating major water rights disputes.

In any event, the Federal Rules of Civil Procedure provide that whatever method of service of process is provided by state law (assuming it is consistent with

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[37] Montana's contention that some potential claimants in the federal cases have not been personally served (Br., 34) is utterly without support in the record. The Tribes are unaware of any persons claiming rights to the use of water in streams before the federal court who have not been served. If, however, there are some, they could be joined.

constitutional due process requirements)[38] is equally available to the federal district court.[39] Service of process in conformity with state law is thus proper in federal court whether or not the specific means utilized are expressly set forth in the federal rules. *See, e.g., Farr & Co.* v. *CIA International de Navegacion de Cuba*, 243 F.2d 342, 349 (2nd Cir. 1956) (service by mail, as provided by state law); *Griffin* v. *Ensign*, 234 F.2d 307, 310-311 (3rd Cir. 1956) (service on state official designated in state nonresident motorist statute); *Milosavljevic* v. *Brooks*, 55 F.R.D. 543, 550 (N.D. Ind. 1972) (service by publication as provided by state law); *see generally* Wright & Miller, Federal Practice and Procedure, § 1112.

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[38] Procedures for service must of course comport with due process. As this Court noted in a water rights action, *Schroeder* v. *New York*, 371 U.S. 208, 212-13 (1962):

> notice by publication is not enough with respect to a person whose name and address are known or very easily ascertainable and whose legally protected interests are directly affected by the proceedings in question.

Simple reliance on publication or substituted service may well fail to meet due process standards.

[39] Rule 4(d)(7), Federal Rules of Civil Procedure provides that one proper method of service of process is "in the manner prescribed by the law of the state in which the district court is held for the service of summons or other like process upon any said defendant in an action brought in the courts of general jurisdiction of that state." Similarly, Rule 4(e) provides that "[w]henever a statute or rule of court of the state in which the district court is held provides (1) for service of a summons, a notice, or an order in lieu of summons upon a party not an inhabitant of or found within the state, or (2) for service upon or notice to him to appear and respond or defend in an action by reason of the attachment or garnishment or similar seizure of his property located within the state, service may in either case be made under the circumstances and in the manner prescribed in the statute or rule . . . ." While there is substantial overlap between these two subdivisions of Rule 4, *see* Wright and Miller, Federal Practice and Procedure, § 1114, the clear intention of these provisions is to authorize service of process in federal actions in conformity with state law.

b. *Employment of special masters.*

Moreover, although it may not have been clear at the time *Colorado River* was decided, the common practice in large general stream adjudications like these has been for the court taking jurisdiction—whether federal or state—to appoint a special master. Montana state law expressly contemplates such action (M.C.A. § 85-2-214, -216) as do the Federal Rules of Civil Procedure, F.R.Civ.P. 53. The special master, of course, can and does hold hearings at whatever sites are convenient to the parties and witnesses. Below, we briefly describe how this process has functioned in three of the principal water cases involving Indian rights to be tried in the past several years.

The first of these cases, already familiar to the Court, is *Arizona* v. *California*, No. 8 Orig. This Court appointed Senior Circuit Judge Elbert P. Tuttle as special master. Judge Tuttle held eight and one half weeks of evidentiary hearings, four weeks in Denver, two weeks in Atlanta, two weeks in Phoenix, and one-half week in Los Angeles, and his report is now being reviewed by the Court.

Similarly, the federal district court in New Mexico has been for some years adjudicating rights of Indian pueblos, other federal interests and persons claiming under state law to several creeks tributary to the Rio Grande, approximately 80 miles north of Albuquerque. *New Mexico* v. *Aamodt*, No. Civ. 6639 (D.N.M.). The court-appointed master held over four weeks of evidentiary hearings on the Indians' reserved rights in Albuquerque and Santa Fe and rendered a decision in September 1982 for review by the federal district judge. The non-Indian rights arising under state law remain to be determined.

In like vein, in 1977 the State of Wyoming commenced an action in Wyoming state courts to adjudicate all water rights in "Water Division No. 3." *In re: The General Adjudication of All Rights to Use Water in the Big Horn*

River System and All Other Sources, Civil No. 4993 (Dist. Ct. Wyo.) That division encompasses rights reserved to the Wind River Indian Reservation. The state court sits in Worland, Wyoming, within the Division. As in the other cases, the court appointed a special master, former United States Congressman Teno Roncalio. The master has completed about 130 days of evidentiary hearings, primarily in Cheyenne, Wyoming, the state capital, over 200 miles distant from the watershed, and the principal seat of the federal district court for the state. Cheyenne was chosen for the convenience of the parties, their counsel and their expert witnesses, most of whom reside outside Wyoming. The master made a recommended decision on the Indian water rights in December 1982. The non-Indian state law rights have not yet been decided.

These cases—one in the original jurisdiction of this Court, one in federal court and one in the state court—exemplify the almost universal practice to appoint special masters in general water rights adjudications. This procedure creates broad flexibility to hold trial wherever it is most convenient for all parties. It also eases the burden on the court system. The court having original jurisdiction over the matter sits in a capacity akin to an appellate court, reviewing determinations made by a master on a record developed before him, not by the court itself. The practice in each case, moreover, has been to determine the Indian reserved rights first, separately and apart from all rights arising under state law. In these circumstances, federal courts are clearly as convenient for parties and witnesses as state courts.

3. Unsettled federal law claims and issues predominate.

Claims to very extensive federal and Indian rights form the crux of these Montana cases. The Montana cases, unlike *Colorado River*, seek to determine the reserved water rights on five of the largest 30 Indian reser-

vations in the country.[40] Determination of the Montana reservations' reserved rights is not incidental to an overriding state purpose of deciding how to apportion scarce water among persons claiming under state law.

Moreover, resolving issues of federal law will predominate over questions of state law in these cases. The federal law issues surrounding the reserved rights of all seven Montana tribes are complex and relatively unsettled.[41] Rights to use water reserved for Indian reservations require a determination of how much water might be used on each reservation in the future, rather than how much has been used in the past and when. Since a court must determine future potential uses, it must, for example, determine the purposes for which each reservation was established: whether, for example, these include preservation of fish and wildlife, mineral or recreational development, and the like. If, as is clearly the case in Montana, see *Winters* v. *United States*, *supra*, agriculture was contemplated, the court must decide how many reservation lands might be "practicably irrigated." *Arizona* v. *California*, 373 U.S. at 600. There may be

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[40] Getches, Rosenfelt and Wilkinson, *Federal Indian Law, Cases and Materials*, 4 (1979).

[41] Decisions of this Court in the past decade have generally clarified and resolved most unsettled legal issues concerning Indian fishing rights, *e.g.*, *Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n.*, 443 U.S. 658 (1979); *Puyallup Tribe, Inc.* v. *Washington State Game Dept.*, 433 U.S. 165 (1977); and jurisdictional conflicts between tribes and states. *E.g.*, *Merrion* v. *Jicarilla Apache Tribe*, —— U.S. ——, 71 L.Ed. 2d 21 (1982); *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136 (1980); *Washington* v. *Colville Confederated Tribes*, 447 U.S. 134 (1980); *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978); *McClanahan* v. *Arizona Tax Comm.*, 411 U.S. 164 (1973); *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145 (1973).

The area of Indian reserved rights has not received similar attention, and is one of the major remaining areas of Indian law with significant unresolved legal issues. *See generally Felix S. Cohen's Handbook of Federal Indian Law*, ch. 10 (1982 ed.).

controversy concerning the "priority date" of water use—whether when the reservation was established, or some other date (such as time immemorial for lands occupied aboriginally, see *New Mexico* v. *Aamodt*, 537 F.2d at 1106, or the date particular lands may have been reacquired by the Indians). Disputes may arise on reservations where non-Indians have purchased former trust allotments as to whether the purchasers share in the reserved water right. *Cf. United States* v. *Powers*, 305 U.S. 527 (1939).

It is true that there are a total of approximately nine thousand claimants under state law in the seven federal cases. But the state law issues in the cases are relatively simple and settled. The principle issues are (1) when a particular party first beneficially used water and (2) how much water has been in continuous beneficial use. Each claimant under state law can make a simple factual presentation of evidence on these issues before a master sitting in a convenient location.

D. Montana state court proceedings are inadequate to resolve the Indian claims.

In *Colorado River*, the Court did "not decide . . . whether, despite the McCarran Amendment, dismissal would be warranted . . . if the state proceeding were in some respect inadequate to resolve the federal claims." 424 U.S. at 820. The Montana state court proceedings are inadequate in two respects to determine the Indian claims. First, as discussed in the separate brief of the Crow Tribe, which we adopt, the disclaimer provisions in Montana's Enabling Act and Constitution continue in force to deny state courts jurisdiction over water rights. Second, as the Ninth Circuit also held, conflicts of interest encumber the representation of the tribes by the United States.

Contrary to arguments of some petitioners and *amici* (Ariz. Br., p. 41 n.41) these conflicts do not infect the

federal court proceedings in which the tribes have intervened.[42] This is because in those federal cases where tribes are parties represented by their own counsel, they will unquestionably be bound by the outcome. That is not the situation in the Montana state courts. The tribes are not parties in state court and because of their immunity from suit cannot be involuntarily joined.[43] Their interests are represented only by the United States. Conflicts of interest, however, impede its adequate representation of the tribes. The state court proceedings thus cannot authoritatively adjudicate the tribal rights, and dismissal of the federal cases in deference to them is accordingly inappropriate.

While the United States may of course normally represent its Indian trust beneficiaries in litigation, 25 U.S.C. 175, *Heckman* v. *United States*, 224 U.S. 413 (1912), it cannot provide adequate representation where a conflict of interest exists.[44] *E.g.*, *New Mexico* v.

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[42] In five of the seven Montana federal cases, all tribes on the stream systems to be adjudicated have intervened. In a sixth, the Assiniboine and Sioux Tribes of the Fort Peck Reservation have intervened, but other tribes on the streams have not. See p. 4, *supra*.

[43] The McCarran Amendment consents only to suits against the United States. It does not waive the immunity from suit of Indian tribes. The law is settled that tribes are immune from suit absent express congressional waiver of that immunity. *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49 (1978); *United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512-513 (1940). The McCarran Amendment does not so much as mention Indians or Indian tribes, and a waiver of sovereign immunity "cannot be implied but must be unequivocally expressed." *United States* v. *King*, 395 U.S. 1, 4 (1969); *Santa Clara Pueblo* v. *Martinez*, *supra*, 436 U.S. at 58-59.

[44] Due process in its procedural sense requires that one either be a party or be adequately represented in a lawsuit for the judgment to determine one's interest. *E.g.*, *Mullane* v. *Central Hanover Bank and Trust Co.*, 339 U.S. 306 (1950); *Hansberry* v. *Lee*, 311 U.S. 32 (1940). *See also Logan* v. *Zimmerman Brush Co.*, —— U.S. ——, 71 L.Ed.2d 265 (1982).

Aamodt, 537 F.2d 1102 (10th Cir. 1976), *cert. denied*, 429 U.S. 1121 (1977); *Rincon Band of Mission Indians* v. *Escondido Mutual Water Co.*, 459 F.2d (9th Cir., 1972). Indeed, the existence of such conflicts of interest was one of the factors that convinced Congress to enact 28 U.S.C. 1362:

> Currently, the right of the Attorney General of the United States to bring civil actions on behalf of tribes without regard to jurisdictional amount, a power conferred on him by special statutes, is insufficient in those cases wherein the interest of the Federal Government as guardian of the Indian tribes and as Federal sovereign conflict, in which case the Attorney General will decline to bring the action.
>
> The proposed legislation will remedy these defects by making it possible for the Indian tribes to seek redress using their own resources and attorneys.

S. Rep. No. 1507, 89th Cong., 2d Sess. 2 (1966).

This purpose of Section 1362, together with the conflict of interest problem in the Montana cases, requires federal court adjudication here. As the Court of Appeals found, clear conflicts of interest exist in these cases between the rights of the tribes and those of other federal agencies, such as "the Bureau of Land Management, the U.S. Forest Service and other federal entities." 668 F.2d at 1089, Pet. App. C, 43. For example, in the Milk River system, the United States claims reserved water rights for the Milk River Project of the Bureau of Reclamation, for various water holes and nonproducing oil and gas wells on public lands, for grazing, stock watering and other uses on the public lands, for five national wildlife refuges and three water fowl production areas, for two military installations, for customs stations, and to maintain and operate four reservoirs. Jt. App. II, 103a-107a. Each of these non-Indian federal claims is plainly adverse to the rights of the four Indian tribes on that stream system.

Moreover, there are *four* tribes on the *same* Milk River system, where water is in short supply. These tribal claims conflict with one another, and cannot adequately be represented by the tribes' common trustee.[45] *See New Mexico*

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[45] This problem cannot be avoided by the United States' asserting maximum claims to water for each tribe for which it is trustee and for each federal agency using water.

First, on streams with a scarce water supply, a large claim for a senior user can mean that a junior user takes nothing. Thus, a junior user always has an interest in reducing the amount claimed by a senior user.

Second, there may be disputes as to what the priority date is for some claims. For example, in its federal court Milk River complaint, the United States claims a priority date of March 4, 1888 for the Rocky Boy's Indian Reservation. This priority date for Rocky Boy's is obtained by tacking on a reserved right claimed for a military fort established on the present site of the Rocky Boy's Reservation on that date. This date is two months before the May 1, 1888 priority date claimed for the Fort Peck and Fort Belknap Reservations. But quite clearly, that claim is adverse to the interests of the Tribes of both those Reservations; those Tribes would limit the Rocky Boy's Reservation to a later, 1916 priority date, when the Indian Reservation was established after the fort was discontinued.

Third, as in *Trbovich* v. *United Mine Workers*, 404 U.S. 528, 538-539 (1971), the United States represents two distinct types of interests: (1) it "in effect becomes the . . . [tribes'] lawyer" for purposes of protecting tribal rights for which it is trustee, and (2) it has obligations toward the public interest both as respects national Indian policy and for other non-Indian federal projects and activities. Development and analysis of expert testimony for the purposes of framing and presenting a claim for reserved water rights requires numerous judgments. A conflict of interest can affect these judgments, or appear to do so. In *Arizona* v. *California*, No. 8, orig., for example, the United States claimed that there were 36,800 practicably irrigable acres of additional lands on the five reservations involved. The intervenor Tribes claimed that 23,300 acres above those identified by the United States were also practicably irrigable. The Master determined that 15,800 acres claimed by the Tribes in fact did meet the "practicably irrigable" standard, as well as 32,800 of the acres claimed by the United States.

v. *Aamodt*, 537 F.2d 1102, 1104-1106 (10th Cir. 1976), *cert. denied*, 429 U.S. 1121 (1977) (United States could not adequately represent four Indian pueblos and the Santa Fe National Forest on a single river system); *United States* v. *Truckee-Carson Irrigation District*, 649 F.2d 1286, *modified*, 666 F.2d 351 (9th Cir.), *cert. granted*, Nos. 81-2245, -2276 and 82-38, 51 U.S.L.W. 3287 (1982) (United States representation of both a reclamation district and an Indian tribe with conflicting interests in a prior case could not operate to preclude subsequent assertion of claims by the Tribe adverse to the district). In situations of this kind—where there are conflicting claims to property involving multiple Indian tribes which cannot all be represented by the United States—specific legislation waiving tribal sovereign immunity has always been required to provide for their judicial resolution.[46]

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[46] For example, in 1958, Congress passed a law authorizing a long-standing dispute between the Hopi and Navajo Tribes regarding title to land originally included in the Hopi Reservation to be adjudicated by the United States District Court for the District of Arizona with a right of appeal directly to this Court. Public Law 85-547, Act of July 22, 1958, 72 Stat. 403. *See Healing* v. *Jones*, 210 F. Supp. 125 (D. Ariz. 1962), *aff'd*, 373 U.S. 758 (1963). In 1974, Congress passed a second statute, authorizing adjudication by the United States District Court for the District of Arizona of a second dispute between the Navajo and Hopi Tribes concerning lands within the boundaries of the Navajo Reservation claimed by the Hopis. Section 8 of the Act of December 22, 1974, P.L. 531, 88 Stat. 1712. *See Sekaquaptewa* v. *MacDonald*, 544 F.2d 396 (9th Cir. 1976), *cert. denied*, 430 U.S. 931 (1977).

See also Act of December 20, 1973, P.L. 93-195, 87 Stat. 769 (providing for the conflicting claims of the Choctaw, Chickasaw and Cherokee Indian Nations of Oklahoma to the streambed of the Arkansas River to be resolved by a three-judge district court). *See Choctaw Nation* v. *Cherokee Nation*, 393 F. Supp. 224 (E.D. Okla. 1975).

Of course, no special jurisdictional act is required to permit federal court adjudication of the water rights of the tribes that have intervened in the federal cases.

Unless the Tribes voluntarily submit to state court jurisdiction [47]—or Congress passes a law waiving their sovereign immunity—no state court in Montana can make a binding adjudication of Indian reserved water rights. Either such a suit would be dismissed for failure to join the Tribes as indispensable parties, *Lomayaktewa* v. *Hathaway*, 520 F.2d 1324 (9th Cir. 1975), *cert. denied sub nom. Susenkewa* v. *Kleppe*, 425 U.S. 903 (1976); *Tewa Tesuque* v. *Morton*, 498 F.2d 240 (10th Cir. 1974), or it could only adjudicate the non-Indian rights.[48]

By contrast, since tribes have intervened in all but one of the federal cases, final adjudication of their rights can be had in those federal cases.[49] Indeed, since the state

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[47] No Tribe has intervened as a defendant in the Montana state proceedings. As the Ninth Circuit found, dismissing the federal court cases would leave the tribes with the "Hobson's choice" of either participating before state courts they justifiably distrust or leaving representation of their interests to a conflicted trustee.

[48] At the very least, the presence of serious potential conflicts of interest in the state court cases—which could deprive adjudication of tribal rights of finality—is a severe disadvantage to those proceedings, relative to federal court cases where the potential problem is removed by tribal participation. This factor alone sustains the Ninth Circuit's determination that dismissal of the Montana cases was unwarranted.

[49] Federal court water adjudications in which tribes are plaintiffs are pending or have been adjudicated in almost every western state. This attests to the confidence tribes have in federal courts to determine their reserved rights and to the desire of most tribes to have their invaluable water rights determined.

In most of the Montana and Arizona cases, tribes either filed the suits or have intervened. And tribes are plaintiff intervenors in most of the federal court cases discussed in n.30, p. 23. *E.g.*, *United States* v. *Truckee-Carson Irrigation District*, 649 F.2d 1286, *modified*, 666 F.2d 351 (9th Cir.), *cert. granted*, Nos. 81-2245, -2276, and 82-38, (1982) 51 U.S.L.W. 3287 (Pyramid Lake Tribe plaintiff); *New Mexico* v. *Aamodt*, 537 F.2d 1102 (10th Cir. 1976), *cert. denied*, 429 U.S. 1121 (1977) (Pueblos of Nambe, Pojoaque, Tesuque and San Ildefonso plaintiff-intervenors); *United States* v.

courts cannot in these circumstances authoritatively determine the Tribes' rights, the McCarran Amendment's objective—that federal rights be judicially determined—can only be fulfilled by federal court adjudication of those cases.

CONCLUSION

During the century past, the United States bought peace with the Indians for promises of land[50] and protection.[51] These cases seek to quantify the value of those promises. Determining the Indian water rights involved here will require inferences of intention and purposes from long ago. The States, parties and *amici* in this litigation well know how the choice of forum can influence the outcome of such subtle determinations. This Court knows it as well. *Garner* v. *Teamsters Union*, 346 U.S. at 485, 490-491 (1953). Only last Term, at substantial cost, it struck down the Bankruptcy Act of 1978 for failure to provide bankruptcy judges with the protections of tenure and salary that the Constitution requires. *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Company*, —— U.S. ——, 73 L.E.2d 598 (June 28, 1982).

Walton, 647 F.2d 42 (9th Cir.), *cert. denied*, 454 U.S. 1092 (1981) (Confederated Colville Tribes plaintiff). In the above federal court cases, tribes have participated as plaintiffs even though the United States is also a party.

In the rare circumstance where a tribe refuses to have its water rights adjudicated in federal or state court, and a conflict of interest also prevents adequate representation of the tribe by the United States, Congress could of course waive the tribe's immunity from suit.

[50] Land often "arid and, without irrigation, . . . practically valueless." *Winters* v. *United States*, 207 U.S. 564, 576 (1908) (speaking specifically of one of the Reservations involved in these cases).

[51] Protection from, among others, "the people of the States [who are] often their deadliest enemies." *United States* v. *Kagama*, 118 U.S. 373, 384 (1886).

The Indian tribes which brought or intervened in these suits want a federal forum for their federal claims. Congress has said they are entitled to one. 28 U.S.C. 1362. And nothing in the McCarran Amendment, or its legislative history, suggests they are not. Here—unlike *Colorado River*—(1) the tribes have sued as plaintiffs in federal court, (2) conflicts of interest preclude their adequate representation in state court, thus preventing state court proceedings from authoritatively deciding their rights, (3) the federal court suits were filed before the state even enacted its water adjudication statute, (4) the federal cases are comprehensive, not piecemeal, and (5) the federal forum is as convenient as state courts for the adjudication.[52] The judgment of the Court of Appeals should be affirmed.

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[52] In *Colorado River*, 424 U.S. at 812-813, this Court suggested that federal Indian rights might be fully protected by the eventual review of federal claims available here. With deference, we suggest that this is not so. The continuing pressure on this Court's docket means, inevitably, that a substantial number of meritorious cases must go unreviewed. Indeed, the Court has several times since *Colorado River* emphasized the importance of federal court protection of Indian rights and the corresponding inadequacy of state court adjudication of them. See cases cited p. 13, *supra*. *See also Wilson* v. *Omaha Indian Tribe*, 442 U.S. 653, 673-674 (1979) ("fair treatment of tribal and federal interests" insured because "the legal issues are Federal and the federal courts will have jurisdiction to hear them").

There are simply too many of these cases to allow plenary review of each one in this Court. Many of the questions of fact and law presented by every such judgment may not seem of general importance because—even though the rights are "essential to the life of the Indian people"—the particular questions presented will be unique to each particular reservation. Finally, of course, many of the most crucial determinations have a large factual component, *see, e.g.*, February 22, 1982, Report of the Special Master in *Arizona* v. *California*, No. 8 Orig.; pp. 33-35, *supra*. This Court's review of factual questions is inevitably limited. Accordingly, as Congress well knew when it enacted 28 U.S.C. 1362, full protection of Indian tribes' federal water rights can be had only if suits involving these rights are heard in the first instance in a federal court.

Respectfully submitted,

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